IN THE

Supreme Court of the United States

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC.
AND
JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL,
Petitioners,

v.

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO & FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED AND DAVID C. MURRAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ALLIED STORES CORPORATION AND DEY BROTHERS & CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004

PAMELA S. DWYER
SULLIVAN & CROMWELL
Of Counsel

JOHN KEELER
Security Mutual Building
Binghamton, New York 13901

HINMAN, HOWARD
& KATTELL
Of Counsel

Counsel for Respondents
Allied Stores Corporation
and Dey Brothers & Co., Inc.

IN THE

Supreme Court of the United States

No. 78-525

WILMORITE, INC., et al.,
Petitioners,

v.

EAGAN REAL ESTATE, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ALLIED STORES CORPORATION AND DEY BROTHERS & CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners raise no issue worthy of review by this Court. The decisions of the courts below are fully consistent with nearly two decades of judicial precedent holding that joint efforts to influence public officials are exempt from antitrust prosecution. *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). There is no merit to petitioners' suggestion that this Court should overrule or emasculate the *Noerr-Pennington* doctrine.

Petitioners' argument that respondents were not engaged in constitutionally protected activity because they were not the actual complainants before the local zoning boards or the state courts simply ignores the prior decisions of this Court that use of the "third-party technique" does not constitute a violation of the Sherman Act and is "legally irrelevant". *Eastern Railroads Presidents' Conference* v. *Noerr Motor Freight, Inc., supra* at 129-33, 140-42.

Petitioners' subsidiary claim that they were barred "access to usable zoning relief" misconstrues this Court's decisions in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), which concerned a pattern of baseless, repetitive litigation that effectively barred one party from access to the courts. Nowhere in either of their complaints did petitioners allege they were barred such access; on the contrary, their complaint is simply that the litigation took too long before they finally prevailed by a divided decision in the New York Court of Appeals.

Petitioners' claim that the publicity campaign allegedly conducted by respondents was a "sham" because it may have caused some measure of economic injury to them is likewise disposed of by *Noerr*. This Court recognized that an "incidental effect" of an attempt to influence public officials may be the "infliction of some direct injury upon the interests of the party against whom the campaign is directed", but found that risk less compelling than the free exercise of First Amendment rights. 365 U.S. at 143.

Finally, the petition raises no constitutional issue that has not been dispositively determined by this Court in the previously-cited cases. In 1977, this Court declined to review two decisions by Courts of

Appeals which involved virtually the same allegations as were made here, *e.g., Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Central Bank of Clayton* v. *Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977), and the petition points to no subsequent conflict among the Circuits requiring a different determination. On the contrary, the courts have been remarkably consistent in their application of this Court's prior decisions.

Conclusion

This petition, raising no issues to which this Court has not already definitively addressed itself and to which those decisions were not correctly applied, should be denied.

Respectfully submitted,

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004

PAMELA S. DWYER
SULLIVAN & CROMWELL
Of Counsel

JOHN KEELER
Security Mutual Building
Binghamton, New York 13901

HINMAN, HOWARD
& KATTELL
Of Counsel

Counsel for Respondents
Allied Stores Corporation
and Dey Brothers & Co., Inc.